SUPREME COURT, U. S.

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No. 1144

Supreme Court of the United States

OCTOBER TERM, 1966

UNITED STATES, *Petitioner,*

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR RESPONDENT IN OPPOSITION

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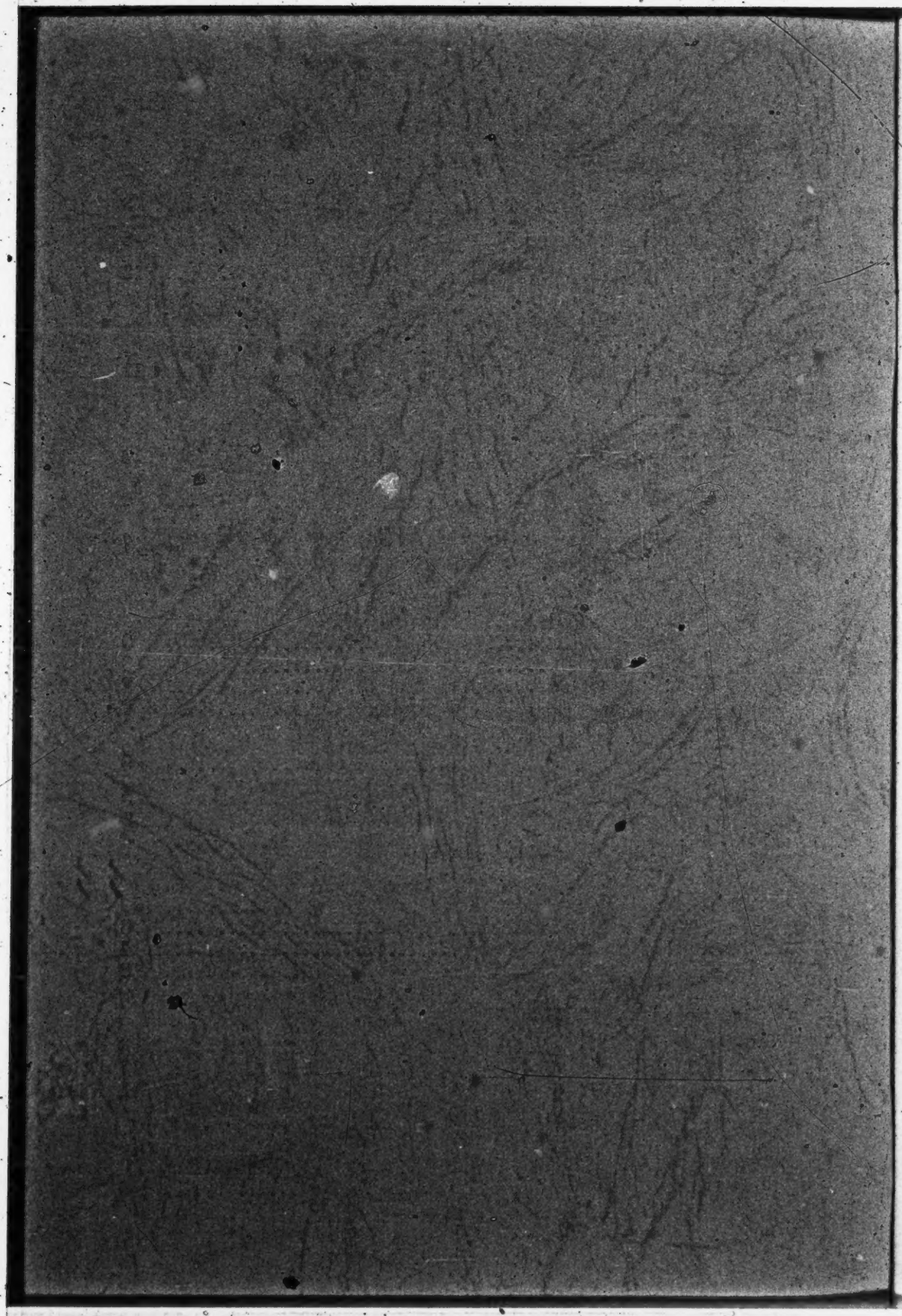

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QUESTION PRESENTED

Whether premiums taxes paid by the respondent, a mutual life insurance company, to the Dominion of Canada and to the provinces of Ontario and Quebec, each of which also imposed an income tax of general application from which mutual life insurance companies were exempt by specific statutory provisions, were "paid in lieu of" income taxes so as to be allowable as a credit against United States income taxes.

STATUTE AND REGULATIONS INVOLVED

Section 901 of the 1954 Internal Revenue Code allows a credit for income taxes paid to any foreign country; section 903 of the Code expands the definition of income taxes to include taxes paid in lieu of income taxes:

> "SEC. 903. CREDIT FOR TAXES IN LIEU OF INCOME, ETC., TAXES.
>
> "For purposes of this subpart and of sections 164(a) and 275(a), the term 'income, war profits, and excess profits taxes' shall include a tax paid in lieu of a tax on income, war profits, or excess profits otherwise generally imposed by any foreign country or by any possession of the United States."

The Treasury Regulations under this section of the Code (which have been in force without substantial modification since enactment of the "in lieu of" credit provision in 1942) provide

> "* * * the term 'income, war profits, and excess profits taxes' includes a tax imposed by statute or decree by a foreign country or by a possession of the United States if—
>
> "(1) Such country or possession has in force a general income tax law,
>
> "(2) The taxpayer claiming the credit would, in the absence of a specific provision applicable to such taxpayer, be subject to such general income tax, and
>
> "(3) Such general income tax is not imposed upon the taxpayer thus subject to such substituted tax." (Reg. 1.903-1(a).)

STATEMENT

Respondent, a mutual life insurance company incorporated in New York, transacted business in Canada during the years involved in this action, 1950-55. The Dominion government and the provinces of Ontario and Quebec imposed income taxes of general application, from which mutual life insurance companies such as respondent were exempt by virtue of specific statutory provisions. However, Ontario and Quebec each imposed on such companies a tax of 2 per cent on premiums received from policyholders residing within the province, and the Dominion imposed a similar tax on premiums received from policyholders residing in the other Canadian provinces.

Since before the beginning of this century, the provinces of Ontario and Quebec have imposed premiums taxes on mutual life insurance companies. These provinces enacted income taxes of general application for the first time in 1932, but mutual life insurance companies were exempt from such taxes. (Findings 22 and 26).[1]

During the years at issue in this case, the corporate tax statutes of Ontario and Quebec by their terms exempted insurance companies from income taxes because they paid premiums taxes. The 1950 Ontario Corporations Tax Act provided that the generally applicable Ontario corporate income tax "shall not be imposed" on any company "that pays taxes under this Act as a[n] . . . insurance company . . . ." (Finding 27). The only taxes payable under the Act by an insurance company were premiums taxes. The legis-

[1] References are to the numbered Findings of Fact made by the court below which are reprinted in Appendix A of the Petition.

lative history of the predecessor of this statutory provision makes it clear that the Ontario legislature deliberately exempted insurance companies from the income tax because they were "specially taxed" on premium receipts. (Finding 27).

The Quebec Corporation Tax Act imposed an income tax on "every incorporated company . . . which is not otherwise specially taxed under" certain enumerated subdivisions. Since respondent was "otherwise specially taxed" as an insurance company under a subdivision imposing premiums taxes, it was therefore exempt from the Quebec income tax. (Finding 23).

A similar pattern is reflected in the taxing systems of the other provinces of Canada: premiums taxes were historically imposed on insurance companies; income taxes were not. By 1941, all of the provinces had in effect both a premiums tax and an income tax and, as the provincial statutes demonstrate, insurance companies were exempt from the income tax because they were paying premiums taxes. (Findings 28-46).[2]

Prior to World War II, the Dominion government had never imposed either premiums taxes or income taxes on mutual life insurance companies. (Finding 55). Since 1917, the Dominion income tax statute had exempted life insurance companies except for amounts "credited to shareholders' account[s]"; mutual life companies, having no shareholders, were thus exempt from income tax. (Finding 51). Effective in 1941, the Dominion and all of the provinces entered into "War-

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[2] In British Columbia and Newfoundland, for example, the statutes specifically provided that the premiums taxes were "in lieu of" all other taxes. See generally Finding 46, which sets forth the pertinent statutory provisions in effect in 1941 in the provinces.

time Tax Agreements," pursuant to which the provinces repealed or suspended the operation of most of their corporate taxes, including premiums and income taxes, and "rented" those taxes to the Dominion in return for specified payments from the Dominion. These tax rental agreements, which were originally conceived as a wartime emergency measure, were extended through 1951 with all provinces except Ontario and Quebec, and through 1956 with all provinces except Quebec. (Findings 56-59).

In 1941, in partial implementation of the wartime rental agreements described above, the Dominion taxed mutual life insurance companies for the first time. Confronted with a choice as to how best to raise wartime revenues from the life insurance industry, the Dominion chose to impose a premiums tax—at approximately the same average rate that had been in effect in the provinces—and refrained from imposing an income tax. The intent of the Dominion tax authorities was that the tax status and liability of all insurance companies under the new Dominion taxes should be substantially the same as under the pre-War provincial statutes. (Finding 59).[3]

The premiums taxes paid by the respondent during the years 1950-55 pursuant to the statutes described in the foregoing paragraphs totaled $112,158.86, of which $18,845.17 was paid to Ontario for the years 1950-52, and $23,580.93 to Quebec and $69,732.76 to the Dominion for the years 1950-55. (Finding 18).

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[3] The Minister of Finance stated that the Dominion premiums taxes were being imposed "as a result of the provincial [Wartime Tax] agreements" and "in place of the provincial [premiums] taxes." (Finding 59).

The court below examined the taxing systems in the Dominion and the provinces, in accordance with the criteria prescribed in the Treasury Regulations quoted above (p. 2), and concluded that the legislative decisions, by the provinces in the 1930's not to extend the income tax to mutual life companies but to continue the premiums tax, and by the Dominion in 1942 to adopt the provincial pattern when it first imposed any tax on such companies, constituted "deliberate selection[s] between a special method of raising revenue and a general method. . . . In other words," the court said, "both the Dominion and the provinces decided to impose or retain the premiums tax because these insurance companies were not being asked to pay income taxes. . . ." (Petition, p. 24). It accordingly held that the premiums taxes were "in lieu of" income taxes and were allowable as a credit against United States income taxes under the relevant sections of the Code.[4]

REASONS FOR DENYING THE WRIT

The decision of the court below is a carefully considered and clearly proper application of the "in lieu of" tax credit provision. The application is proper because the court correctly resolved what is essentially a question of fact—the relationship between Canadian income and premiums taxes in their application to mutual life insurance companies. The decision has no such broad implications as the Petition perceives. It

[4] In so holding, the court followed its two earlier decisions which involved precisely the same issue: The Prudential Ins. Co. v. United States, 319 F.2d 161 (Ct. Cl. 1963), and The Prudential Ins. Co. v. United States, 337 F.2d 651 (Ct. Cl. 1964). A district court in California has reached the same conclusion. Occidental Life Ins. Co. v. United States, 250 F. Supp. 130 (S.D. Cal. 1965).

is not, and is not claimed to be, in conflict with any decision of this Court or any lower Federal court.[5] It applies the very test prescribed by the Treasury in its Regulations and does not in any way broaden the scope of the law or enunciate principles of general application. Accordingly, review by this Court is not warranted.

1. The Petition rests upon a misconception of what the court below decided. The court did not, tacitly or otherwise, adopt "the view that all a taxpayer need show to credit a foreign excise tax is that he is exempt from the foreign jurisdiction's income tax." (Petition, p. 10). The more sophisticated view that it did take appears from the following passage in the second of the two earlier cases in which it decided the same issue in favor of another mutual life insurance company:

> "The various materials defendant presents in this case fail to demonstrate that there was not a very close connection between the imposition of the Canadian premiums taxes involved here and the failure to impose income taxes. On the contrary, we are persuaded by the history and terms of the various Canadian taxing acts that these premiums taxes were paid 'in lieu of' income taxes imposed on others." *The Prudential Ins. Co.* v. *United States,* 337 F.2d 651, 654 (Ct. Cl. 1964).

Additional historical materials were belatedly brought forward and fully developed by petitioner in the in-

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[5] The only other relevant Court of Appeals decision is consistent with the decisions of the Court of Claims. In Northwestern Mutual Fire Ass'n v. Commissioner, 181 F.2d 133 (9th Cir. 1950), the court held that, during 1942 and 1943, when mutual casualty companies in Canada paid premiums taxes but were exempt from income taxes, the premiums taxes they paid were in lieu of income taxes.

stant case and the decision below reflected "full review of the more extensive record of the legislative history of the Canadian tax statutes now before us." (Petition, p. 17). That history comprehended more than a half century of Canadian tax experience and included statutes, legislative debates, court decisions, and administrative determinations. Thus, it was only after inquiry into all of the evidence of statutory action and intention that the court concluded that the Dominion and the provinces determined to utilize a special method of exacting revenue from mutual life insurance companies, *i.e.*, premiums taxes, rather than to require them to pay income taxes.

It is clear, therefore, that the court did not view as irrelevant the indications urged by petitioner as showing that the premiums taxes were not in lieu of or a substitute for income taxes in the Dominion and the two provinces. (Petition, p. 8). It considered them at length and rejected them as unpersuasive. In so doing it made the very inquiry prescribed by petitioner's own Regulations (Petition, p. 25), and petitioner's failure to charge any disregard of the Regulations is further evidence that what is sought here is merely review by this Court of the resolution by the court below of a factual dispute between the parties.

2. The decision of the court below does not broaden the credit beyond its intended scope. The suggestion (Petition, p. 8) that gross receipts taxes should be regarded as "in addition to," rather than substitutes for, an income tax is historically unsound. When Congress amended the foreign tax credit provisions by the Revenue Act of 1942 to include "in lieu of" taxes it specifically had in mind taxes measured by "gross

income, gross sales or number of units produced."[6] Congress in that same Revenue Act provided a premiums tax as an alternative basis for computing the Federal income tax liability of mutual casualty companies.[7] Moreover, despite the emergence and growing importance of income tax statutes in the states of this country, the premiums tax is still generally utilized as the method for exacting revenues from insurance companies as a substitute for the income tax. (Petition, pp. 19-20). In the District of Columbia, Congress itself has specifically provided that premiums taxes "shall be in lieu of all other taxes" except real estate taxes and fees imposed under the insurance laws, (D.C. Code § 47-1806 (1961 Ed.)), and has exempted from the District income tax insurance companies that pay the District premiums tax. (D.C. Code, § 47-1554(g) (1961 Ed.)).

In expanding the Revenue Code credit provisions to include taxes paid in lieu of income taxes, Congress indeed had in mind, as petitioner notes, the "administrative problems" which had prompted the enactment in some foreign countries of simpler taxes as a substitute for the income tax. (Petition, p. 6). One need not look beyond the experience of Congress itself to appreciate that there are few, if any, areas of tax law that have presented more complexities than life insur-

[6] S. Rep. No. 1631, 77th Cong., 2d Sess. (1942); 1942-2 Cum. Bull. 504, 602.

[7] Section 207 of the 1939 Code and section 821 of the 1954 Code, prior to 1963 amendment. In 1955, Congress again enacted a premiums tax, this time as an alternative method of taxing life insurance companies on income from certain non-life business. (Section 802 of the 1954 Code, as amended by the Life Insurance Company Tax Act of 1955).

ance. Since 1913 the imposition of income taxes on life insurance companies has been an erratic process of experimentation that is still continuing.[8] The Canadian choice of a simple premiums tax in place of an income tax surely reflects the very kind of solution of "administrative problems" that the "in lieu of" provision was designed to encompass.[9]

3. The Petition sees special significance in the fact that in the Dominion some insurance companies were required to pay both a premiums tax and an income tax. (Petition, p. 9). The argument appears to be that if the premiums tax is not in lieu of an income tax for all companies, it cannot be so regarded in the case of any company. Such a contention presupposes that there normally is, or should be, similar tax treatment for the several categories of insurance companies, whereas the fact is that both the Dominion and the United States have always taxed life insurance companies differently from other insurance companies. It also overlooks the complete consistency in the tax treatment in Canada of mutual life insurance companies such as respondent. All such companies—foreign and domestic—pay only premiums taxes and

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[8] Prior to 1921, life insurance companies were taxed generally like all other corporations. From 1921 until 1958, they were taxed on their "net investment income" which was determined by a series of different formulae, pursuant to the various Revenue Acts between 1921 and 1939, the 1939 Code, the 1954 Code, and the Life Insurance Company Tax Acts of 1955 and 1956. Since 1958, in accordance with the provisions of the Life Insurance Company Income Tax Act of 1959, they have been subject to a complex three-phase tax formula involving underwriting and investment income and, in the case of stock life companies, distributions to shareholders.

[9] See Occidental Life Ins. Co. v. United States, 250 F. Supp. 130, 133 (S.D. Cal. 1965).

no income taxes.[10] It is thus entirely illogical to suggest that a premiums tax paid by a mutual life insurance company cannot have been paid in lieu of an income tax merely because some other type of insurance company may have been subject to both.

There is no inequity in the circumstance that some "American businesses" in Canada pay both excise and income taxes and are permitted a credit only for the latter. (Petition, p. 9).[11] The relationship between various types of foreign taxes cannot be established by generalizations or labels.[12] In each case the inquiry must be directed to the taxpaying situation of "the taxpayer claiming the credit," as the Regulations com-

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[10] Canadian stock life companies likewise pay no income tax on their insurance business; in the Dominion they do pay tax on amounts credited to shareholders. (Findings 51 and 52).

[11] The assertion that the purpose of the "in lieu of" provision was to equalize the foreign tax burdens of non-competing American businessmen is wholly novel. (Petition, p. 9). As the court below recognized (Petition, p. 25), the foreign tax credit provisions were expressly enacted to relieve a United States taxpayer from the necessity of paying a full United States tax as well as a foreign tax on its foreign business. Burnet v. Chicago Portrait Co., 285 U.S. 1. The decision below involves no "large loophole" (Petition, p. 6) unless petitioner means that a loophole is created every time the Government loses a tax contention that involves a significant amount of money.

[12] Although it is questionable whether, in the case of a life insurance company, the petitioner's characterization of a premiums tax as an "excise" tax is correct, a determination as to whether a particular tax is an "excise" tax is of no relevance in resolving the present issue. The Internal Revenue Service has ruled that a mining excise tax in Quebec was in lieu of the Quebec income tax (I.T. 4049, 1951-1 Cum. Bull. 32) and that Cuban premiums taxes were in lieu of Cuban income taxes (Rev. Rul. 55-504, 1955-2 Cum. Bull. 578).

mand. Whether excise taxes paid by American utility, mining, or automotive companies in Canada serve a different function in the tax structure of Canada than premiums taxes paid by mutual life insurance companies is quite immaterial. The court below did not purport to determine the relationship between such taxes and income taxes for all companies doing business in Canada.

CONCLUSION

The decision of the court below, which resolves particularized factual contentions in a manner entirely consistent with the governing statute and Regulations, is in conflict with no other decision and presents no special or important reason warranting review. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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